United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1253

76-1258

To be argued by:
JOYCE KRUTICK BARLOW

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA
Respondent

against-

FRED STEINBERG and
DENNIS RIESE,
Defendants-Appellants

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT FRED STEINBERG

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FRED STEINBERG

Preliminary Statement

The government's brief in its entirety is a deliberate attempt to mislead this court by misquoting testimony and distorting cases cited as precedent.

Statement of Facts

The testimony of Agent Volpe clearly indicated that the alleged statement by Steinberg that "the Lindsay administration

had been bought and the police were taken care of." (Tr 103) referred to an allegation that the company, not Steinberg, had the Lindsay administration bought. In Agent Volpe's memorandum of April 9, 1975 (Riese Ex. A, Riese App. 396a) Volpe clearly states

> Fred stated that his company "had the Lindsay administration bough '...

Yet the government, in its brief on page 3, and again on page 26, tells this court that Volpe testified that Steinberg had paid off the police department and the Lindsay administration.

It can only be assumed that this was a preconceived plan on the government's part to distort the trial testimony to appear to create a predisposition to commit bribery on Steinberg's part that was totally non existent.

A further attempt to distort the facts occurs when the government, at page 6 of its brief, claims that the May 6, conversation "rambled on through dinner" (G Brief 6). A reading of pages 11 and 12 of GX 1a (RA 274a and 275a) clearly shows that the agents did not have dinner at this meeting.

On page 7 of its brief, the government indicates that it was Steinberg and Riese who turned the conversation into

a "negotiating session". (G Brief, 7) The government would have this court believe that Riese offered free dinners and that this was the beginning of the "negotiating session". The government, however, completely ignores the fact that for four pages of transcript prior to the suggestion of dinners, the agents were pressing Steinberg and Riese for "something...on a monetary value" (RA 313a GX la, 50,) and continually pressing these young men with statements such as "you know, one hand washes the other". (RA 312a, GX la, 49) Contrary to what the government would have this court believe, it was the agents who turned the conversation into a "negotiating session".

The government fails to tell this court on page 8 of its brief that Steinberg refused to give <u>any</u> money to the agents, be it <u>his own or</u> corporate, at the May 14th meeting.

The government, now tries to claim for the very first time in this case that Volpe wanted to make "the papers in the alien's file <u>appear</u> to be legitimate." (G Brief 9, emphasis added) We urge this court to review (GX 2a, 16, RA 345a) where Volpe tells Steinberg "This is gonna be strict legit. This isn't gonna be phony or nothing, (GX 2a, 20, RA 348a, 349a) and where Volpe continues to stress that this was all strictly

legal. The government seeks to ignore these pointed and forceful attempts by Volpe to assure Steinberg that everything was legal. The government further ignores Volpe's concession upon cross-examination, that it <u>was</u> in fact perfectly legal for Steinberg, as an employer, to complete these forms. Yet the government insists in distorting the facts in a clumsy attempt to convince this court that the facts are more favorable to their case than in reality they are.

POINT I

THE GOVERNMENT'S BRIEF FAILS TO DISTINGUISH BETWEEN APPELLANT STEINBERG'S ARGUMENTS IN POINT I AND II OF HIS BRIEF, AND IMPROPERLY COMBINES TWO SEPARATE AND DISTINCT DEFENSES

Defendant-appellant Steinberg in his brief in main argues two separate and distinct defenses. The first is that he was entrapped into committing the acts alleged by the conduct of the government agents. Further, that since the government failed to establish beyond a reasonable doubt that he was predisposed, he was entitled to a directed verdict of acquittal.

The second defense is that the conduct of the agents was so outrageous that it deprived Steinberg of due process of law.

The government attempts to combine these two points, and claims that both ought to be defeated since they allegedly established a predisposition. In this attempt, the government takes the position that government misconduct can never bar a prosecution. (G Brief, 18) This is clearly erroneous. There is no doubt that five of our nine Supreme Court Justices (Powell, J., Blackmun, J., Brennan, J., Stewart, J., and

Marshall, J.) held in HAMPTON v. U.S., ____U.S.____, 48 L. Ed. 2d 113 (1976) overreaching of government agents would bar a conviction upon due process principles even when the government can prove predisposition.

The government further seeks to bolster its confused position by asserting that the HAMPTON opinion stated that the defendant's predisposition was dispositive and thus the arguments of appellant Steinberg and Riese must fail. The government, in its reading of HAMPTON apparently failed to see that HAMPTON conceded his predisposition to commit the crime. In the case at bar, both Steinberg and Riese did not so concede, and in fact both strongly urge that no predisposition existed.

The government's brief has sought to build a case that did not exist. Contrary to the government's contention at page 20 of its brief, these agents did commit a crime. They drank beverages without paying for them (Tr 454). The government claims Steinberg and Riese "repeatedly approached the government agents" (G Brief, 21). Yet in fact every meeting and every telephone call (with one alleged exception) was instigated by the government agents. Steinberg and Riese did not approach these agents, seeking them out to make a deal. The testimony more than adequately reflects that the reverse was true.

POINT II

APPELLANT STEINBERG PROPERLY PRESERVED HIS RIGHT TO CHALLENGE THE COURT'S CHARGE ON ENTRAPMENT

Counsel for appellant Steinberg properly raised objections to the court's charge (Tr 1279). Further counsel joined in the objections raised by co-counsel (Tr 1287).

This court should also note that early in the trial, the trial court granted the application by both counsel to permit the objections raised by one to be viewed as having been raised by both counsel, thus the record was adequately protected for appellate purposes.

POINT III

THE PROSECUTOR'S SUMMATION WAS WHOLLY IMPROPER AND DEPRIVED APPELLANT STEINBERG OF DUE PROCESS OF LAW

Appellant Steinberg does not seek to convey the argument that a prosecutor may not vigorously advocate his position. Rather, appellant Steinberg contends that a vigorous prosecution must be coupled with fairness and justice on the part of the prosecutor.

The government does not deny that it made these remarks. However, the government argues that its statements were not a comment on the failure of the defendant to take the stand. The words of the prosecutor were straight forward and simple "there is no denial by Mr. Steinberg." (Tr 1218) The fact that it was improper is evident by the trial court's sustaining counsel's objection. However, the trial court failed to issue a limiting instruction, and did not even instruct the jury to disregard the comment. The government's contention that the jury could on their own draw a distinction between Steinberg's alleged failure to respond on the tape, and his Fifth Amendment privilege is ludicrous. The prosecutor's

intent was clear. He sought to make the jury believe that Steinberg had failed to come forward. Clearly viewed in the context of the entire trial this was highly prejudicial.

STATEMENT PURSUANT TO FRAP 28(I)

Appellant, pursuant to Rule 28(I) of the Rules of Appellate Procedure, incorporates by reference all relevant arguments raised by co-appellant Riese.

CONCLUSION

The judgment of conviction should be reversed, and the indictment should be dismissed.

Respectfully submitted,

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Of Counsel

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK }
COUNTY OF NEW YORK } *SS.:*

Joyce Krutick Barlow

being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at Livingston, N. J.

That on the 26 *day of* October *19* 76

deponent served the within reply brief

upon Robert B. Fiske, Jr. & Shea Gould Climenko & Casey, Esqs.

attorney(s) for U.S. & codefendant Dennis Riese

in this action, at 1 St.Andrews Plaza, New York, NY and 330 Madison Avenue, New York, NY

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in – a post office – official depository under the exclusive care and custody of the United States post office department within New York State.

Joyce Krutick Barlow

Joyce Krutick Barlow

Sworn to before me,

this 26 *day of* October *19* 76

[redacted]
Commissioner of Deeds
City of New York 1-129
Certificate filed in New York County